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No. 36

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE PETITIONER

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v.

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE PETITIONER

OPINION BELOW

The order of the United States Court of Appeals for the Seventh Circuit was entered on October 4, 1966 and has not been reported. The opinion of Petitioner has not been reported.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was entered on October 4, 1966, and a timely petition for rehearing *en banc* was denied on December 5, 1966. The jurisdiction of this Court rests on 28 U.S.C. 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED

1. Does a Court of Appeals have jurisdiction to issue a writ of mandamus to prohibit a District Court from directing the Government to furnish a request for a bill of particulars where there is no statutory authority for an appeal by the Government from such order, and where the District Court has lawfully exercised its prescribed jurisdiction?

2. Can a Court of Appeals substitute its discretion for that of a District Court by the issuance of a writ of mandamus preventing the District Court from requiring the Government to furnish a bill of particulars which may disclose, in part, the names of some prospective witnesses?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Because of the number and length of the constitutional provisions and statutes involved, they are set forth in the Appendix, pp. App. 1-5, *infra*.

STATEMENT

Petitioner is a Judge of the United States District Court for the Northern District of Illinois. Pending before him

are two indictments brought by the United States against one Simmie S. Horwitz for making and subscribing false corporate income tax returns, in violation of Section 7206(1), Internal Revenue Code, 1954 (26 USC §7206(1)) (R. 13, 14). The defendant entered a plea of not guilty to each of the indictments and was given leave to file pretrial motions (R. 8).

Among those motions filed was a motion for a Bill of Particulars, (R. 15) which the Government opposed (R. 9). On November 29, 1965, petitioner granted all of the requests for particulars with the exception of Requests 4 and 29(b) (R. 10, 63-64).

On December 3, 1965, respondent filed a motion to vacate that portion of petitioner's order of November 29, 1965, directing respondent to answer Requests 14, 25, 28 and 29(a) of the defendant's Bill of Particulars. Respondent claimed that the furnishing of such particulars would constitute the disclosure, in a criminal case, of a list of the Government's witnesses (R. 68). Respondent then orally amended its motion to include a refusal to answer Request 7 (R. 72-73).

The indictments had charged the making and subscription of false corporate returns wherein the gross sales of the company were misstated (R. 13, 14). The defendant's four questioned requests related in pertinent part, respectively, to the names and addresses of persons from whom unreported gross sales were received; the names and addresses of payers of unreported sales if the specific item of proof was used; the names and addresses of persons present and to whom oral statements were made by the

defendant to support the charges of the indictment;[1] and, finally, the names and addresses of persons other than the defendant whose oral statements were relied upon to support the charges of the indictment.

Petitioner took respondent's motion to vacate under advisement and on December 7, 1965, filed his memorandum opinion affirming his prior order and directing compliance therewith, including request 25 (R. 54, 58-60). However, the order to answer subparagraph (d) of request 25, disclosing the substance of defendant's oral statements, was vacated (R. 54). Petitioner also restricted the language of the request seeking information "on which the government relies" to mean information "as that which the gov-

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[1] Request No. 25 relates to the issue on review and it, together with request No. 24 upon which it is predicated is set out as follows:

"24. Does the Government rely upon any oral statements of the defendant to support the charge in the several counts of the indictments?"

"25. If the answer to Request No. 24 is in the affirmative, state with respect to each such statement, if there was more than one:

(a) the name and address of the person to whom the statement was made;

(b) the date on which the statement was made;

(c) the place where it was made;

(d) the substance of the statement;

(e) whether the person to whom the statement was made was a Government agent at the time of the statement;

(f) the names and addresses of any other person present at the time the statement was made; and

(g) whether a written memorandum or verbatim transcript of the oral statement was made, and if so, whether the Government has possession of the memorandum or transcript."

ernment deems relevant and material," rather than "all such information in the government's possession" (R. 60).

On January 4, 1966, the matter was called to set for trial. Defendant filed a motion for the entry of an order directing the Government to furnish the particulars which it had to that date refused to supply,[2] or in the alternative, to dismiss the indictments (R. 106-108). At this hearing, respondent filed in open court its amended Bill of Particulars (R. 34-35, 78) in which it answered Requests 7 (R. 35-42), 24 (R. 44) and 28 (R. 44) but persisted in refusing to answer Request 14 (R. 43), 25 (R. 44) and 29(a) (R. 45).

By its answers to Requests 24 and 28 it acknowledged that it intended to rely both upon oral statements of the defendant as well as other persons to support the charges of the indictments. Though the respondent had previously taken the position that an answer to Request 7 would require giving the names and addresses of witnesses (R. 72-73), its answer disclosed "the government does not know the name and addresses of those persons from whom the . . . understated gross receipts were received" (R. 42).

At this hearing, petitioner indicated that he would continue the trial indefinitely until such time as the government answered the remaining requests (R. 80). The same day however, the defendant filed a second motion to dismiss the indictments asserting that the court had the right to dismiss them, and that the decision of the Court to postpone trial pending disclosure by the Government, in the face of the refusal of the Government to furnish the particulars, constituted a violation of the Sixth Amend-

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[2] Respondent had previously, on December 10, 1966, refused to answer requests 7, 14, 24, 25, 28 and 29(a) (R. 24, 28, 32, 33-34).

ment by denying the right to a speedy trial (R. 108-110). The court entered and continued the motion giving the Government sixty days within which to answer or possibly suffer dismissal (R. 82).

At the expiration of the sixty days, the motion to dismiss the indictments was called for consideration. Respondent took the position that it would not furnish the information with respect to Question 14 (R. 83), Request 25 (R. 84), and Request 29a (R. 85-86). Upon oral argument, petitioner reconsidered Request 29(a),[3] and viewing it as a request for statements which are in the nature of statements producible under 18 USC §3500, reversed his former position and refused to order the Government to produce the statements pursuant to that request (R. 87). The government requested a week to reconsider its position (R. 89). Petitioner indicated that if the government would be then unwilling to give the information requested, he would dismiss the indictment (R. 89).

One week later, the government filed its answer to Request 14 of the defendant's bill of particulars (R. 90, 45-52), but again refused to answer the remaining request No. 25. In the colloquy between Court and counsel, the information sought by request 25 was further circumscribed to those statements which "were material to the

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[3] Request 29(a) stated as follows:

"If the answer to Request No. 28 is in the affirmative [Does the Government rely upon the statement of any person, other than the defendant, to support the charge in the several counts of the indictments], state with respect to each person, if there is more than one:

(a) name and address of each such person or persons;" (R. 21)

proceedings'' (R. 92). The Government conceded its position sufficiently to agree to furnish statements in the form of admissions made to government agents (R. 92).[4] But, in spite of petitioner's specific findings that the same was not a direction to furnish a list of witnesses (R. 94, 95, 97), the government persisted in refusing to give the answers to request 25 which related to statements made to non-government agents (R. 93).

Petitioner delayed the entry of his proposed order (R. 106) and in the interim, the government filed in the United States Court of Appeals for the Seventh Circuit its Emergency Petition For Stay Order Pending Filing of Petition for Mandamus which was granted together with leave to file a petition for writ of mandamus (R. 1). A Rule to Show Cause was thereupon issued against petitioner (R. 61) and after taking the matter upon briefs without oral argument, the Court of Appeals denied the Petition for writ of mandamus, holding:

> ''The Court finds that the order subject to the petition is not an appealable order, and a review of it would offend the policy against piecemeal appeals in criminal cases, *Cobbledick* v. *United States,* 309 U.S. 323; that mandamus may not be used as a means of reviewing the non-appealable order, *Roche* v. *Evaporated Milk Association,* 319 U.S. 21; that federal courts use mandamus for the traditional purpose of confining a district court to a lawful exercise of its jurisdiction or to compel it to exercise its proper jurisdiction, *Roche* v. *Evaporated Milk Association;* that the district judge's order upon the government to furnish names

[4] To date, this information has not been furnished the defendant (R. 13).

and addresses of witnesses to a defendant may be erroneous, a question we do not decide, but the ruling itself was within the court's jurisdiction, *Roche* v. *Evaporated Milk Association;* that the ruling can be reviewed on appeal from a final judgment; and that there is no question here that the district judge refused to exercise his proper jurisdiction.

"It Is Therefore Ordered that the petition for writ of mandamus be and it is hereby denied." (R. 110)

Thereafter, upon the Government's Petition for Reconsideration of that order, the Court of Appeals reversed itself and undertook to consider the petition.

"The Court finds that in the circumstances of this particular case the court should consider the merits of the ruling of the district court challenged by the government, rather than to remit the government to a radical alternative appealable judgment available to the trial judge upon the government's persistent refusal to comply;

"It is therefore ordered that the order of this court of July 12, 1966, be and it is hereby vacated, and the cause is taken by the court upon the petition for the writ, the briefs of both parties and the record." (R. 112)

Upon reconsideration, and without opinion, it finally ordered that a writ of mandamus issue directing your petitioner to vacate his order directing the government to answer question 25 in defendant's motion for bill of particulars (R. 113).

Thus, petitioner's order, the validity of which is to be considered by this court, relates to the direction to furnish the defendant the names and addresses of non government persons to whom the defendant made statements

material to the proceedings, the date on which the statements were made, the place where they were made, the names and addresses of any other persons present at the times the statements were made, and whether written memoranda or verbatim transcripts of the oral statement were made, and if so, whether the Government has possession of the memoranda or transcripts.

SUMMARY OF ARGUMENT.

I. There persists in our judicial system an antipathy to Governmental right of review in criminal cases, and appeal by the Government is unusual and not favored. *Carroll* v. *United States,* 354 U.S. 394. Piecemeal appeals are generally not permitted and those statutory exceptions to intermediate appeal are addressed either in terms or by necessary operation solely to civil actions. *Di Bella* v. *United States,* 369 U.S. 121.

Congress has shown its propensity to severely limit governmental right of review. This is apparent from the restrictive appellate rights contained in the Criminal Appeals Act, 18 USC §3731, and from its unwillingness, except in unique situations, to enact legislation permitting governmental appeals in criminal cases from orders which do not terminate the prosecution; *c.f.,* 18 USC §1404. Such statutory rights are to be strictly construed and limited to the expressed statutory situations. *United States* v. *Sanges,* 144 U.S. 310; *Di Bella* v. *United States,* 369 U.S. 121. In addition, the general grant of appellate jurisdiction given by Congress to the Courts of Appeal by 28 USC §1291 has never afforded appellate review to the Government in a criminal case. *Carroll* v. *United States,* 354 U.S. 394, 403; *c.f., Stack* v. *Boyle,* 342 U.S. 1.

Mandamus likewise should not and cannot lie in light of the traditional abhorrence to the right of governmental review in criminal cases, especially where the only effect of the writ would be to avoid congressional policy against piecemeal appeals in criminal cases. See *Roche* v. *Evaporated Milk Ass'n.*, 319 U.S. 21. There is no strong and compelling reason for this Court to engraft judicial exception in an area which Congress itself has the power to eliminate, but to date has not. To permit the use of mandamus would be to open the floodgates to review of pretrial orders in criminal cases. See, *Switzerland Cheese Association* v. *Horne's Market*, 385 U.S. 23.

The extraordinary writ has never been approved or used by this court to control a procedural order in a criminal case, within the District Court's jurisdiction, which did not deprive the prosecution of its right to trial permitted by law, or to the results of a proper conviction.

The Court of Appeals may, pursuant to the All Writs Act, 28 USC §1651(a) issue all writs necessary or appropriate in aid of its jurisdiction. In "aid of jurisdiction" has been interpreted to mean in aid of appellate jurisdiction, *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, and that standard is applicable as well, to government applications for the writ. The authority to issue the writ has been sparingly used to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Roche* v. *Evaporated Milk Ass'n.*, 319 U.S. 21, 26. In those cases in which this Court has considered or authorized the writ to control an order in a criminal case, the order either deprived the prosecution of its right to a trial permitted by law or to the results of a proper conviction. *Ex parte United States*, 287 U.S. 241, *Ex parte*

United States, 242 U.S. 27, *United States* v. *Mayer,* 235 U.S. 55, *United States* v. *Smith,* 331 U.S. 469.

Only two cases in the courts below have considered whether the Government may, in a criminal case, resort to the extraordinary relief of mandamus to vacate a pretrial order entered after proper indictment had been returned. The Second Circuit in *United States* v. *Bondy,* 171 F.2d 642 (2d Cir. 1948), held that mandamus was not available to the government to vacate an order granting a bill of particulars. In *In re United States,* 348 F.2d 624 (1st Cir. 1965) the First Circuit granted mandamus on petition of the Government to vacate an order of the District Court providing for the taking of a deposition by a defendant under Rule 15(a) Fed. R. Crim. P. In *Bondy* the court refused mandamus on the theory that the government could not appeal and in light of the legislative purpose to avoid piecemeal reviews, holding, the writ could not therefore be in aid of its appellate jurisdiction and would not issue. In *In re United States,* the court issued the writ on the theory that a persistent refusal by the Government would result either in dismissal of the indictment or contempt, either one of which could be reviewed on appeal. Therefore, the writ was in aid of its appellate jurisdiction.

To accept the reasoning of the First Circuit would make virtually every order unfavorable to the Government in a criminal case subject to review by the extraordinary writ contrary to the ordered judicial process in criminal cases. See *Cobbledick* v. *United States,* 309 U.S. 323, *Roche* v. *Evaporated Milk Ass'n.,* 319 U.S. 21, 30. The writ should not issue in any case where its issuance is neither in the exercise of appellate jurisdiction nor in aid of that jurisdiction. *Marbury* v. *Madison,* 1 Cranch (U.S.) 37, 185.

Since legislation may be held to imply restriction on the use of mandamus, though not specifically stated, *United States* v. *Rice*, 327 U.S. 742, 749, Congress may effectively withdraw the right of mandamus to reviewing courts. Consequently, the power to issue does not exist on some overall theory of always present superintending power to control the administration of the courts. C.f., *United States* v. *United States District Court*, 238 F.2d 713 (4th Cir., 1956). Though mandamus is not specifically prohibited by the Criminal Appeals Act, nevertheless Congressional reclutance to give review to the Government in a criminal case, as evidenced by that Act, permits the conclusion that mandamus is precluded by statutory implication from use therein by the Government.

A balancing of the inherent protections historically afforded defendants in criminal proceedings against the rights of the soverign to proceed with its duty to prosecute and to retain the results of prosecution prohibits application of mandamus to the Government in a criminal case to review an interlocutory order of the District Court which does not deny the Government the right to proceed to prosecution or take from it the results of a conviction. The balancing of these factors is weighted by the Sixth Amendment right to speedy trial which unfettered governmental interlocutory review by mandamus could adversely affect. Similarly, the concepts underlying the Fifth Amendment prohibition against double jeopardy, that the resources and power of the sovereign should not be allowed to make repeated attempts to convict an individual for an alleged offense, are equally prohibitory to prevent persistent review by the Government of interlocutory orders which could materially and mentally debilitate the defendant in the preparation of his defense.

II. However, if the mandamus power exists irrespective of the dichotomy between civil and criminal cases, the standards of either specie of case are applicable to determine the proper issuance of the writ. The traditional use of the writ has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority to do so. *Roche* v. *Evaporated Milk Ass'n.*, 319 U.S. 21, 26.

Petitioner had discretion to grant or deny a bill of particulars and therefore some action on his part was within his jurisdiction to act, Rule 7(f), Fed. R. Crim. P., *Wong Tai* v. *United States*, 273 U.S. 77. Since the All Writs Act is meant to be used only in the exceptional case where there is a clear abuse of discretion, mandamus may be used only to require the inferior court to decide a matter within its jurisdiction, not to control the decision, *Ex parte Loring*, 94 U.S. 418, *Ex parte Morgan*, 114 U.S. 174; and may not be a device for the reviewing court to substitute its discretion for that of the lower court. *Re Winn*, 213 U.S. 458.

"Clear abuse" of judicial discretion permitting the issuance of a writ of mandamus is confined to a situation and circumstances which clearly show arbitrary action not justifiable in view of such situation and circumstances, *Hartford-Empire Co.* v. *Obear-Nester Glass Co.*, 95 F.2d 414 (9th Cir. 1938). See, *Burns* v. *United States*, 287 U.S. 216. The action of the district court cannot be set aside by the reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. *In re Josephson*, 218 F.2d 174 (1st Cir. 1954). The Government is obliged to show the foregoing and that its right to the mandamus was "clear and indisputable" *United States* v. *Duell*, 172 U.S. 576.

The purpose of the bill is to furnish the defendant information respecting the charge when necessary to the preparation of his defense and to avoid prejudicial surprise at the trial, *United States* v. *Glaze,* 313 F.2d 757 (2d Cir. 1963), and when necessary for those purposes he is entitled to the same "as of right", *United States* v. *United States Gypsum,* 37 F.Supp. 398 (P.D.C. 1941). In light of the rights of the defendant thereto, petitioner's order was not a "clear abuse of his discretion" warranting the issuance of the writ.

The most that can be urged is that the ordered request for particulars contains the names of some possible witnesses, but not a "list of witnesses' which is an enumeration of all witnesses who will testify at the trial. *Bird* v. *United States,* 187 U.S. 118; *Logan* v. *United States,* 144 U.S. 263. The reason for requiring disclosure of some of these names is that it is not that they will or may be witnesses but that the defendant requires identification of the times, places and persons present in order to prepare his defense. Petitioner's order requires no disclosure of evidence, any legal theory, nor even the substance of the statements made by the defendant.

In many cases, the names of actual or potential witnesses have either been disclosed by bill of particulars or such disclosure has been discussed with approval. *Kirby* v. *United States,* 174 U.S. 47; *United States* v. *Debrow,* 346 U.S. 374. In addition many courts have commented that the *disclosure* of the names of witnesses is discretionary. *Barnes* v. *United States,* 347 F.2d 925 (8th Cir. 1965); *United States* v. *Frank,* 23 F.R.D. 145 (D.D.C. 1959); *United States* v. *Solomon,* 26 F.R.D. 397 (S.D.Ill. 1960).

No prejudice exists to the Government by such disclosure since no showing was made that any harm would befall the persons whose names would be disclosed, c.f. *Gordon* v. *United States,* 344 U.S. 414.

The order entered by the court to furnish to the defendant the requested bill disclosed no more and furnished the defendant no extraordinary information than many other courts have from time to time ordered furnished. Under no circumstances could the court below have concluded that petitioner's order was the "clear error of judgment in the conclusion reached upon a weighing of the relevant factors", *In re Josephson,* 218 F.2d 174 (1st Cir. 1954) which must be found before mandamus could issue to direct a vacation of his order.

ARGUMENT

I.

THE COURT OF APPEALS EXCEEDED ITS POWER IN ISSUING A WRIT OF MANDAMUS TO PROHIBIT THE DISTRICT COURT FROM DIRECTING THE GOVERNMENT TO FURNISH A REQUEST FOR A BILL OF PARTICULARS.

A. The Historical, Constitutional, Congressional, And Judicial Antipathy To Governmental Right Of Review In Criminal Cases Militates Against The Use Of Mandamus By The Government To Review Interlocutory Orders In Criminal Prosecutions.

In apparent dissatisfaction with petitioner's attitude of "being unduly helpful to defendants by having the Government identify people who were supposed to have been there when the crime took place" (R. 70), the Government adamantly persisted in its refusal to comply with petitioner's order to furnish the defendant with a bill of particulars (R. 65, 78, 83, 90). Having in mind not merely the effect of the ruling in the instant proceeding (R. 76), respondent clearly intended to achieve review of this order by the court below (R. 100) in anticipation of " . . . obtaining . . . a definitive statement of the applicable legal principle . . . " (R. 6).[5]

[5]Although petitioner does not seek to reach the issue of whether respondent was requesting an advisory opinion, it is well settled that the federal courts do not render such opinions. *United Public Workers of America (C.I.O.), et al.* v. *Mitchell*, 330 U.S. 75, 89.

It is not now disputable that as a condition of review, finality is a characteristic of federal procedure. *Cobbledick* v. *United States,* 309 U.S. 323, 324. The principle that review awaits final judgment was derived from the common law and enacted by the First Congress, First Judiciary Act §§21, 22, 25, 1 Stat. 73, 83, 84, 85 (1789); *DiBella* v. *United States,* 369 U.S. 121, 124. It is also historically clear that the existence of appellate jurisdiction in a specific federal court over a given type of case depends upon authority expressly conferred by statute. *Carroll* v. *United States,* 354 U.S. 394, 399.

The concept of review only after final judgment remains dominant, 6 Moore, Federal Practice (2d Ed. 1953) 113, despite Congressional enactments in specific proceedings where disruption by intermediate appeal is outweighed by the possible damage of error if unreviewed before the judgment is definitive and complete,[6] and despite allowance of immediate appeal by this Court from orders collateral to the principal litigation touching matters that will not "affect, or . . . be affected by decisions of the merits of [the] . . . case." *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546.

But, criminal cases stand on a different footing:

> "Every statutory exception is addressed either in terms or by necessary operation solely to civil actions. Moreover, the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law." *DiBella* v. *United States,* 369 U.S. 121, 126.

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[6] See 30 Stat. 544, 553 (1898), as amended, 11 USC §47 (bankruptcy proceedings); 28 USC §1252, (orders invalidating federal statutes); 28 USC §1253, (injunctions issued or refused by statutory three-judge courts); 28 USC §1292(a)(1)-(4) (injunctions, receivership, admiralty, patent infringement); 28 USC §1292(b), 72 Stat. 1770, (discretionary certification of controlling questions of law in civil cases).

It is not unusual that a different perspective should persist as to appellate review in criminal cases and that appeal by the Government is " . . . something unusual, exceptional, not favored." *Carroll* v. *United States*, 354 U.S. 394, 400. "To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice." *Cobbledick* v. *United States*, 309 U.S. 323, 325.

In order to meet the problem raised by the termination of prosecution based upon construction of the constitutional validity of a federal statute, Congress adopted the Criminal Appeals Act of 1907, 34 Stat. 1246, the forerunner of the present 18 USC §3731, 63 Stat. 97, amended, 63 Stat. 97,[7] allowing appeals by the Government in limited specific situations terminating the prosecution. Although Congress can enact legislation[8] to permit appeals by the Government in criminal cases from orders which do *not* terminate the prosecution,[9] all such statutory rights are construed strictly

[7] "The legislative history emphasizes the awareness of the Congress that Government appeals in criminal cases were a sharp innovation and Congressional concern that such jurisdiction should go no farther at that time than the immediate problem of affording review for trial court opinions as to the construction or validity of federal statutes." *Carroll* v. *United* States, 354 U.S. 394, 402 Note 11.

[8] Article III, Section 2, of the Constitution of the United States.

[9] *E.g.*, Narcotic Control Act of 1956, §201, 70 Stat. 567, 573, 18 USC §1404 allowing appeal from orders granting pretrial motions to suppress the use of seized narcotics as evidence. See also, District of Columbia Code, 1951, Ed. §23-105, 48 Stat 831, governing appeals by the United States or the District of Columbia in criminal cases arising in the District of Columbia.

and limited to those expressed statutory situations. *United States* v. *Sanges*, 144 U.S. 310, 312; *DiBella* v. *United States*, 369 U.S. 121, 130. Of course, the superintending limitation of the Fifth Amendment prohibition against double jeopardy restricts all such statutes. C.f., *Fong Foo* v. *United States*, 369 U.S. 141.

Furthermore, the Government cannot disregard the Criminal Appeals Act and seek review of interlocutory orders in criminal cases[10] through the application of the general grant of appellate jurisdiction to the Courts of Appeal by 28 USC §1291 on the theory that orders of that sort, and of the kind herein involved, possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders which may be appealable under the theory of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541. The application of the reasoning of that decision to criminal cases has been extremely limited, *Carroll* v. *United States*, 354 U.S. 394, 403, see, *Stack* v. *Boyle*, 342 U.S. 1, and never been applied to permit appellate review to the Government. "Nor are the considerations against appealability made less compelling . . . by the fact that the government has no later right to appeal . . . " *DiBella* v. *United States*, 369 U.S. 121, 130. Thus, as a general proposition, the right of governmental appellate review in criminal cases is inimical to historical, constitutional, congressional and judicial precedents.

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[10] Interlocutory, as here applied, is essentially equivalent to those orders which do not result in a termination of the prosecution. *C.f.*, *Berman* v. *United States*, 302 U.S. 212, 213; *Parr* v. *United States*, 351 U.S. 513.

With a tacit acknowledgement of the foregoing principles, respondent filed its petition for writ of mandamus with the court below, claiming, "The Government has no remedy other than by mandamus" (R. 6). Mandamus, however, should not and cannot lie here in light of the traditional abhorrence to the right of governmental review in criminal cases, the strict application of such right to limited statutes, and the traditional reluctance to the use of mandamus where statutes establish the conditions of appellate review and the only effect of the writ would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases. *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 30.

There is no strong and compelling reason for this Court to create a judicial erosion of a bulwark which the Congress itself has the power to eliminate, but to date has not. If it is desirable that the Government be entitled to review from orders of the kind now before the Court, Congress can meet the need:

> "* * * It is the function of the Congress to decide whether to initiate a departure from the historical pattern of restricted appellate jurisdiction in criminal cases." *Carroll* v. *United States*, 354 U.S. 394, 407.

To permit the use of mandamus to review the grant of a bill of particulars in a criminal case is to "open the floodgates" to review by mandamus of many pretrial orders. See, *Switzerland Cheese Asso.* v. *Horne's Market*, 385 U.S. 23, 24.

B. The extraordinary Writ Has Never Been Approved Or Used By This Court To Control A Procedural Order In A Criminal Case, Within The District Court's Jurisdiction, Which Did Not Deprive The Prosecution Of Its Right To Trial Permitted By Law, Or To The Results Of A Proper Conviction.

While the obvious dichotomy between civil and criminal cases has been sharply drawn by this Court in analyzing the right of the Government to appeal in a criminal case, *United States* v. *More* (U.S.) 3 Cranch 159; *United States* v. *Sanges,* 144 U.S. 310; *Re Heath,* 144 U.S. 92; *Cross* v. *United States,* 145 U.S. 571; *Cobbledick* v. *United States,* 309 U.S. 323; *Carroll* v. *United States,* 354 U.S. 394; *DiBella* v. *United States,* 369 U.S. 121, nevertheless, no sharply defined criteria have been similarly drawn along this distinction as to the availability to the Government in a criminal case of the extraordinary writ of mandamus.

It is conceded that the court below may, pursuant to the "All Writs Act", 28 U.S.C. §1651(a), 62 Stat. 944, as amended, 63 Stat. 102:

> " . . . issue all writs necessary or appropriate in aid of [its] jurisdiction and agreeable to the usages and principles of law."

But to what extent is the authority to do so when the writ is sought by the Government in a criminal case?

The leading authority in mandamus in a criminal case is this court's decision in *Roche* v. *Evaporated Milk Ass'n,* 319 U.S. 21, where the writ was sought by the *defendants.* There, no question was raised as to the power of the court in such circumstances to grant the writ, but instead the issue was "whether in the light of all the circumstances the case was an appropriate one for the exercise of that

power." 319 U.S. at 26. Noting jurisdiction of the Court of Appeals to be exclusively appellate, this Court held authority to issue the writ was in *aid of that jurisdiction* without regard to whether an appeal had been perfected, since "otherwise the appellate jurisdiction could be defeated and this purpose of the statute authorizing the writ thwarted by unauthorized action of the District Court obstructing the appeal." 319 U.S. at 25. By so stating, the court noted the inherent premise that the defendant who was seeking the writ might at some time have the right to appeal. The principles which were enumerated as guides to the exercise of discretion by appellate courts on the use of the extraordinary remedy were directed to those instances in aid of their appellate jurisdiction.

"In aid of appellate jurisdiction" is a standard equally applicable to governmental applications for the writ. Though its right to avail itself of such appellate review is greatly circumscribed, 18 USC 3731, c.f., 18 USC 1404, this Court has approved, though sparingly, the issuance of the extraordinary remedy upon application by the Government in criminal cases without extensive comment thereon; but see, *Ex parte United States*, 287 U.S. 241, 246. While, as stated in *DiBella* v. *United States*, 369 U.S. 121, 125, N. 4:

> " . . . the authority [to issue the writ] has been most sparingly exercised, when no other remedy will suffice, 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26, 87 L.Ed. 1185, 1190, 63 S. Ct. 938",

the authority is even more sparingly exercised in a criminal proceeding, and still less frequently exercised when applied for by the government. Until this case, this court has

never approved, nor even considered exercising that authority to control an order in a criminal case which was merely procedural, within the court's jurisdiction,[11] and which did not deprive the prosecution of its right to a trial permitted by law or to the results of a proper conviction.[12]

Those cases in which the issuance of an extraordinary writ sought by the Government in a criminal case has been approved by this Court, are *Ex parte United States*, 287 U.S. 241, *Ex parte United States*, 242 U.S. 27, *United States* v. *Mayer*, 235 U.S. 55, and *United States* v. *Smith*, 331 U.S. 469.

In *Ex parte United States*, 287 U.S. 241, following indictment, the District Court refused to issue a bench warrant. Concluding that the ruling constituted a refusal to permit the enforcement of the law, this Court stated it "is equivalent to a denial of the absolute right of the government, as matters stand, to put the accused on trial, since that cannot be done in his absence." (287 U.S. at 249)

An earlier decision bearing the same title, *Ex parte United States*, 242 U.S. 27 considered the action of a dis-

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[11] That petitioner had the jurisdiction to grant a bill of particulars can hardly be disputed. Rule 7(f), F.R.Cr.P. The most that can be said is that the order was so sweeping as to amount to an abuse of discretion. *United States* v. *Bondy*, 171 F.2d 642 (2d Cir., 1948). Whether, petitioner's order was an abuse of discretion, *and if so*, whether such abuse constitutes a divestiture of jurisdiction once obtained is discussed below, pp. 33-34.

[12] A similar issue is now pending in the 5th Circuit. *United States* v. *Cabot, Judge of the United States District Court for the So. Dist. of Fla.*, No. 24147.

trict court suspending execution of sentence upon a plea of guilty to a charge of bank embezzelment where the statute required a mandatory minimum term of imprisonment. While the appropriateness of the writ was challenged, the contention was disposed of by "a mere reference" to five earlier decisions of the court, and relating to civil matters.[13] This court concluded that mandamus should issue since the District Court had no power under the statute to suspend the sentence.[14]

Both *United States* v. *Mayer,* 235 U.S. 55 and *United States* v. *Smith,* 331 U.S. 469 involve the action of the District Court in granting new trials where the courts had already lost jurisdiction to so act. In *Mayer,* the court vacated the judgment of conviction after its term of court had ended and the case was awaiting argument in the appellate court. In *Smith,* conviction had been affirmed on appeal, mandate had issued, and the defendant imprisoned when the district court attempted to grant a new trial.

None of the foregoing involve a pre-trial procedural ruling after the case had actually begun. They represent actions which either deny the executive branch, in the

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[13] *Ex parte Bradley,* 7 Wall 364, disbarment proceeding; *Life & Fire Ins. Co.* v. *Wilson,* 8 Pet. 291, mortgage foreclosure; *Re Winn,* 213 U.S. 458, tort action; *In re Metropolitan Trust Company of the City of New York,* 218 U.S. 312, suit to declare the issuance of securities illegal; *Ex parte Metropolitan Water Co.,* 220 U.S. 539, eminent domain proceeding.

[14] In spite of the foregoing, this Court, motivated there by the same "exceptional circumstances" of the case as was the district court, suspended the issuance of the writ "so as to afford ample time for executive clemency, or such other action as may be required to meet the situation". 242 U.S. at 53.

first instance, its right to prosecute,[15] see, *Petition of United States,* 306 F.2d 737, 738 (9th Cir. 1962), or deprive it of the fruits of the conviction after trial.

The Courts below have, on occasion, in criminal cases, entertained and granted the extraordinary writ to the Government but only where the government was denied its right to prosecute[16] or deprived of the results of the

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[15] In *Fong Foo* v. *United States,* 369 U.S. 141, the Second Circuit had granted the government's petition for writ of mandamus to vacate a judgment of acquittal entered after three government witnesses had appeared and while the fourth was testifying, on the ground that the trial court was without power under the circumstances to direct the acquittal. In a *per curiam* reversal, this court never considered the government's right to mandamus, but distinguished reliance on both *Ex parte United States,* 242 U.S. 27 and *Ex parte United States,* 287 U.S. 241, on the ground that the Fifth Amendment prohibition against double jeopardy was not involved in either case and that such constitutional guarantee was violated when the Court of Appeals set aside the judgment of acquittal and directed that the defendants be tried again for the same offense.

[16] *C.f., Petition of United States,* 306 F.2d 737 (9th Cir. 1962), mandamus authorized where on a plea of *nolo contendere* to one count, district court dismissed remaining counts "in the interests of justice" (p. 738); *United States* v. *Igoe,* 331 F.2d 776 (7th Cir. 1961), cert. den. 379 U.S. 865, mandamus issued where the defendant waived jury trial but the Government refused to consent and the case was dismissed for want of prosecution. *C.f., Singer* v. *United States,* 380 U.S. 24; *United States* v. *United States District Court,* 238 F.2d 713 (4th Cir., 1956), cert. den., 352 U.S. 981, mandamus issued where the district court refused to allow subpoenas to bring records before a grand jury in its investigation. See also, *United States* v. *Hester,* 325 F.2d 654 (9th Cir., 1963) mandamus refused, though entertained, to vacate order dismissing indictment for want of prosecution for failure to grant speedy trial, Sixth Amendment right prevailed; *c.f., Fong Foo* v. *United States,* 369 U.S. 141, where Fifth Amendment right prevailed.

conviction after trial.[17] Only two cases have considered whether the government may, in a criminal case, resort to the extraordinary relief of mandamus to vacate a pretrial order entered after a proper indictment had been returned. The first of these, *United States* v. *Bondy,* 171 F.2d 642 (2d Cir. 1948), is a *per curiam* opinion, directly in point, holding that mandamus was not available to the government to vacate an order granting a bill of particulars. The second, a decision of the First Circuit, *In re United States,* 348 F.2d 624 (1st Cir. 1965), granted mandamus on petition of the Government to vacate an order of the district court providing for the taking of a deposition by the defendant under Fed. R. Crim. P. 15(a).

In *Bondy* the court noted it had no power to issue writs except in aid of its appellate jurisdiction, *Roche* v. *Evaporated Milk Ass'n,* 319 U.S. 21, 25, and that the order was interlocutory and not directly appealable, *Cogen* v. *United States,* 278 U.S. 221. Noting further the writ to be impermissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews, *United States Alkali Export Association, Inc.* v. *United States,* 325 U.S. 196, 203, and that the Criminal Appeals Act, 18 USC §3731, permitted no appeal in the instant situation, the court went on to say:

> "Accordingly we have neither actual nor potential jurisdiction to review the order, and, since our power to issue the writ is only in aid of our appellate jurisdiction, the writ should not be granted.

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[17] *United States* v. *Lane,* 284 F.2d 935 (9th Cir. 1960); *United States* v. *Gibbs,* 285 F.2d 225 (9th Cir. 1960), probation granted in a narcotics case where statute prohibited doing so.

> "The petitioner urges that we may restrain a district judge from acting beyond his jurisdiction and that the order complained of is of that character. We cannot so view it. Plainly the district court has power to grant a bill of particulars. This is expressly authorized by Rule 7(f) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. . . . The most that can be urged is that the order was so sweeping as to amount to an abuse of discretion; it did not deal with matters beyond the court's jurisdiction."

To the contrary, the First Circuit in *In re United States, supra,* concluded that the otherwise interlocutory nature of the order did not preclude review by the government's application for the writ, even though its ordinary rights of appeal in a criminal case are severely limited. Its rationale was that should the Government fail to produce the witnesses,[18] or if they should refuse to testify, and should the court enter an order of contempt, then appeal would lie, *Bowman Dairy Co.* v. *United States,* 341 U.S. 214; or alternatively, if the court should dismiss the indictment should the government fail to comply, then appeal would lie under 18 U.S.C. §3731.[19] Thus, upon

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[18] It is interesting to note that the names of the two proposed principal witnesses upon whose testimony the government's case "was essentially dependent", 348 F.2d at 625, were disclosed by the government in a bill of particulars. *C.f.,* the position of the government advanced herein, that the disclosure of the names of possible witnesses is beyond the jurisdiction of petitioner and subject to review by the extraordinary writ. (R. 4, 6).

[19] This latter reasoning would appear to be contrary to the holding of the Ninth Circuit in *United States* v. *Apex Distributing Co.,* 270 F.2d 747 (9th Cir. 1959) and the reasoning of the Third Circuit in *United States* v. *Pack,* 247 F.2d 168 (3rd Cir. 1957).

such possible "conjectured appellate jurisdiction" theory the court went on to say "We see no reason why the government should not be able to do directly what it could effectuate indirectly", 348 F.2d at 625. Relying also upon the general importance of the question test used in the application of the writ to the interpretation of a civil rule, *Schlagenhauf* v. *Holder*, 379 U.S. 104, it held mandamus to lie.[20]

To accept the "what could happen" rationalization of the First Circuit as a basis for a conceivable appeal by the Government and thereby give it possible "appellate jurisdiction" for it to protect, makes virtually every order unfavorable to the Government in a criminal case subject to review by the extraordinary writ.[21] Clearly, such an approach is contrary to the ordered judicial process from which the prohibition against piecemeal appeals is meant to protect, especially in criminal cases. *Cobbledick* v. *United States*, 309 U.S. 323; *Roche* v. *Evaporated Milk Assoc.*, 319 U.S. 21, 30.

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[20] In actuality the Court of Appeals withheld the issuance of the writ "[i]n accordance with our usual practice . . . because we may assume that the District Judge will vacate his order without such." 348 F.2d at 626.

[21] It was apparently this "what could happen" rationale which prompted the court below to reverse its denial of the writ (R. 110-111) and to reconsider the merits of petitioner's order "rather than remit the government to a radical alternative appealable judgment available to the trial judge upon the government's perisistent refusal to comply" (R. 112).

In addition, the "general importance of the issue" theory relied upon by the First Circuit, if it exists at all[22] by virtue of *Schlagenhauf* v. *Holder*, 379 U.S. 104, certainly should be restricted to civil proceedings and not extended to effectively destroy the historical, statutory and judicial limitations upon the right of review by the Government in criminal cases.

While it is true that mandamus does not lie where an appeal may be had, *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 27-28, the contrary—that it *does* lie where appeal may not be had,—does not necessarily follow either. *Ex parte Newman*, 14 Wall 152, 168. Moreover, though the "appellate jurisdiction" aided by the court may be "protecting a past exercise of [appellate] jurisdiction", *United States* v. *U.S. District Court*, 334 U.S. 258, 264, and not merely an existing or future appellate jurisdiction,[23] still the power to issue the writ is extended only to cases where its issuance is either an exercise of appellate jurisdiction or in aid of appellate jurisdiction. *Marbury* v. *Madison*, 1 Cranch (U.S.) 37, 185.

Nor should the extraordinary writ issue irrespective of the foregoing well-established judicial criteria on a theory of some super-power of appellate courts to conduct the administration of the business of the district courts. C.f., *United States* v. *United States District Court*, 238 F.2d 713 (4th Cir., 1956). Indeed, if an administrative or

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[22] See, dissent of Mr. Justice Harlan expressing concern lest any question of first impression geared to an allegation of lack of power "would open the door" to the use of the extraordinary writ to test *any* question. 379 U.S. at 129.

[23] See, *United States* v. *Mayer*, 235 U.S. 55, and *United States* v. *Smith*, 331 U.S. 469, where the writ of mandamus was issued, in essence, to protect the efficacy of a prior mandate of the appellate court.

"business of the court's" concept is adopted for review by mandamus of the actions of the lower court, no such writ would ever be held to be beyond the jurisdiction of the appellate court to grant. Yet, this court has concluded, at least where legislative policy is contrary to any review, that an appellate court may not resort to mandamus. *United States* v. *Rice,* 327 U.S. 742, 749.

Thus, a statute by its terms may preclude review of a lower court's decision by way of appeal and through implication be held to similarly preclude review of such decision by mandamus as well. See, *In the Matter of Mathew Addy Steamship & Commerce Corporation,* 256 U.S. 417; *Employer's Reinsurance Corp.* v. *Bryant,* 299 U.S. 374; *Ex parte Sherman,* 124 U.S. 364; *Ex parte Pennsylvania Co.,* 137 U.S. 451, 454; and, *Ex parte Baldwin,* 291 U.S. 610. Moreover, there would seem to be no Constitutional prohibition against Congressional action specifically providing that judicial acts specified therein cannot be reviewed by mandamus.

However, where this Court has looked with disfavor on piecemeal government review in criminal cases, *Carroll* v. *United States,* 354 U.S. 394; *Cobbledick* v. *United States,* 309 U.S. 323; *Di Bella* v. *United States,* 369 U.S. 121, and where appeals by the Government in criminal cases are severely restricted by statute, though such statutes do not specifically prohibit mandamus in other instances, the reasoning of *United States* v. *Rice, supra,* permits the conclusion that mandamus herein is precluded by statutory implication. The decision in the instant proceeding, how-

ever, need not turn on this conclusion alone. Indeed, petitioner does not urge that it does. Instead, some balancing of each of the foregoing factors must be made in order to arrive at a just standard of the right of the government to review by mandamus in a criminal case. Thus, balancing the inherent protections historically afforded defendants in criminal proceedings: constitutional,[24] statutory,[25] and judicial,[26] against the rights of the sovereign to proceed with its duty to prosecute[27] and to retain the results of its prosecution,[28] petitioner urges that mandamus should not lie on application of the government in a criminal case to review an interlocutory order of the district court which does not deny the Government the right to proceed to prosecution or take from it the results of a conviction.

The foregoing suggested limitation on the discretion to issue the writ is founded on principles which have always found protection by this Court. Thus, unfettered review by the use of the writ by the Government in a criminal case may interfere with the right to a speedy trial guaran-

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[24] Fifth and Sixth Amendments.

[25] 18 USC 3731.

[26] *Carroll* v. *United States,* 354 U.S. 394; *Cobbledick* v. *United States,* 309 U.S. 323.

[27] *Ex parte United States,* 287 U.S. 241.

[28] *Ex parte United States,* 242 U.S. 27; *United States* v. *Mayer,* 235 U.S. 55; *United States* v. *Smith,* 331 U.S. 469.

teed by the Sixth Amendment.[29] The "anxiety and concern accompanying public accusation," and the other harsh accoutrements attendant to the delay accompanying an interlocutory review procedure made available to the Government are sure to descend upon the defendant:

> "The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes." *Klopfer* v. *North Carolina*, 386 U.S. 213, 221.

Furthermore, the principles underlying the prohibition in the Fifth Amendment guarantee against being "twice put in jeopardy of life or limb" are not far removed from the theory upon which petitioner urges the above stated limitation on Government use of the extraordinary writ in criminal cases. The unlimited resources of the Government to press repeatedly for successive reviews of interlocutory orders in a criminal case could bleed the defendant's mental and material coffers dry. Often, as in the instant case, a writ of mandamus has the unfortunate consequence of making the judge a litigant obliged to leave his defense to one of the litigants before him. *Ex parte Fahey*, 332 U.S. 258. Of course, it is the defendant who must bear the expense, and consequently, the theory of this

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[29]At one point in the instant case, petitioner had indicated a propensity to continue the cause indefinitely until the Government complied with his order (R. 80) but the defendant raised the Sixth Amendment issue and the matter was set down for a date certain (R. 108-110).

The Court may note further that it will be approximately two years from the date the order granting the bill of particulars was issued to the approximate date of decision in this matter. Though it is *dehors* the record, a critical defense witness has died during the interim delay.

court's reasoning set forth in *Green* v. *United States*, 355 U.S. 184, 187-188 is equally appropriate here:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty".

It is thus clear that if the rights of an accused, justifiably paramount to those of the sovereign, are to prevail in an area to date unencroached upon by the Congress, the inexorable erosion of that principle must be halted by this court's restriction of the right of governmental review through the use of the extraordinary writ. Petitioner does not urge that the Government has no right whatsoever to the writ in a criminal case. To the contrary; but such rights must be finely counterbalanced with the inherent rights of a defendant. Governmental review must fail, in such balance, here, where the district court's interlocutory order did not terminate the prosecution or preclude it from the results of a conviction.

II.

DISTRICT COURT'S ORDER GRANTING A BILL OF PARTICULARS WHICH MAY DISCLOSE, IN PART, THE NAMES OF SOME PROSPECTIVE WITNESSES IS EXERCISE OF DISCRETION WITHIN PRESCRIBED JURISDICTION AND NOT TO BE DISTURBED BY COURT OF APPEALS.

If this Court concludes either that the court below had jurisdiction to entertain the petition for the extraordinary

writ, or at least that its discretion to act upon such a petition by the Government to vacate a procedural order in a criminal case was not inherently circumscribed, the issue next to be resolved is whether it correctly exercised its discretion in granting the writ. If the mandamus power thus exists irrespective of the dichotomy between civil and criminal cases, the standards of either specie of case are applicable to determine the proper issuance of the writ.

A. A Court Of Appeals May Not Substitute Its Discretion For That Of An Inferior Court Acting Within The Limits Of Its Jurisdiction:

The traditional use of the writ, both at common law and in the federal courts, "has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its authority to do so." *Roche* v. *Evaporated Milk Ass'n.*, 319 U.S. 21, 26.

The writ was issued below to vacate an order granting a bill of particulars. It is indisputable that petitioner had the discretion under Rule 7(f), Federal Rules of Criminal Procedure,[30] to grant or deny such a request. *Wong Tai* v. *United States*, 273 U.S. 77. It is clear therefore that some action taken by him on the motion was within his jurisdiction to act. The court below, however, must have issued the writ "to confine [petitioner] to a lawful exercise of its prescribed jurisdiction" within the *Roche* v. *Evaporated Milk Ass'n.*, test, *supra*,[31] since it is clear that this

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[30] Rule 7(f), F.R.Cr.P., as then constituted, stated, in pertinent part:

"The Court for cause may direct the filing of a bill of particulars."

[31] The court below rendered no opinion and offered no reasons for its issuance of the writ (R. 113).

case does not involve a refusal to adjudicate issues presented to it. C.f., *Ex parte United States*, 287 U.S. 241.

The ruling made by petitioner on the request for particulars was made in the course of the exercise of the court's jurisdiction to decide issues properly brought before it. In considering an exercise of a district court's action within its prescribed jurisdiction, this Court in a civil case, relating to the issuance of an interlocutory order stated:

> "In strictly circumscribing piecemeal appeal, Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the Courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' of the sort held to justify the writ in DeBeers Consol. Mines v. United States, 325 U.S. 212, 217, 89 L.Ed. 1566, 1572, 65 S.Ct. 1130 (1946)". *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 383.

Since the order entered in *DeBeers* was one which it had no power whatsoever to enter, only the question of petitioner's exercise of discretion, or "clear abuse" thereof, is here to be considered.[32]

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[32] The type of action occurring in *DeBeers Consol. Mines* v. *United States, supra*, giving rise to the exceptional application of the writ to an interlocutory order is clearly inapplicable to the situation here. In *DeBeers*, a preliminary injunction was granted which was urged by the restrained parties to constitute a sequestration of property beyond the power of the court. This court held the order was not made to grant interlocutory relief such as could be afforded by any final injunction, but was one "respecting a matter lying wholly outside the issue in the case; no decision of the suit on the merits can redress any injury done by the order . . ." 325 U.S. at 218. In effect, mandamus lay because the lower court had no power whatsoever to enter such an order. This is clearly not the case at hand.

While the issuance of the extraordinary writ is itself generally a matter of discretion for the court below, *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 260; *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379; 6 Moore, Federal Practice, ¶54.10[4] (1953 ed.), the appellate court may not substitute its discretion for that of the lower court, if the district court's discretion is within the limits of its jurisdiction. *Re Winn*, 213 U.S. 458, 467-468.

The nature of the writ issued here is as was stated by Mr. Justice Story in *Ex parte Hoyt*, 13 Pet 279, 290:

> "[The writ] is neither more nor less than an application for an order to reverse the solemn judgment of the district judge, in a matter clearly within the jurisdiction of the court, and to substitute another judgment in its stead."

Mandamus may only be used to require an inferior court to decide a matter within its jurisdiction, not to control the decision. *Ex parte Loring*, 94 U.S. 418; *Ex parte Morgan*, 114 U.S. 174; *Ex parte Wagner*, 249 U.S. 465; see, *Ex parte Slater*, 246 U.S. 128. The action of the appellate court here, was to impermissably substitute its discretion for that of petitioner.

B. Petitioner Acted Within The Limits Of His Jurisdiction And Did Not Abuse His Discretion In Granting The Disputed Bill Of Particulars.

1. The scope of "clear abuse of discretion."

The mere fact that petitioner may have committed an error of judgment in granting the bill of particulars (a fact not conceded, see below pp. 38-44) does not oust him from jurisdiction to make the decision and thus subject it to control by mandamus, *Bankers Life and Casualty Co.*

v. *Holland,* 346 U.S. 379, 382. Indeed, if any support can be offered for the action of the court below, it must be predicated on the theory that petitioner's interlocutory order was not merely "erroneous" but a "clear abuse of discretion", *Bankers Life & Casualty Co.* v. *Holland, supra,* at p. 383, since jurisdiction to grant a bill of particulars is vested in the district court's "sound discretion". *Wong Tai* v. *United States,* 273 U.S. 77, 82.

Any inquiry of what is a "clear abuse" of judicial discretion is confined to whether the situation and circumstances clearly show arbitrary action not justifiable in view of such situation and circumstances. *Hartford-Empire Co.* v. *Obear-Nester Glass Co.,* 95 F.2d 414, 417 (9th Cir. 1938). This Court, in reviewing the familiar principles governing the exercise of judicial discretion, stated:

> "That exercise implies conscientious judgment, not arbitrary action. The Styria v. Morgan, 186 U.S. 1, 9, 46 L.Ed. 1027, 1033, 22 S.Ct. 731. It takes account of the law and the particular circumstances of the case and 'is directed by the reason and conscience of the judge to a just result.' Langues v. Green, 282 U.S. 531, 541, 75 L.Ed. 1027, 1033, 22 S.Ct. 731." *Burns* v. *United States,* 287 U.S. 216, 222-223.

In *In re Josephson,* 218 F.2d 174, 182 (1st Cir. 1954) "abuse of discretion" was interpreted in light of the exercise of the extraordinary writ:

> "All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. One is reminded of the 'clearly erroneous' standard in Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C."

See also, *McBee* v. *Bomer,* 296 F.2d 235 (6th Cir. 1961).

Respondent, in seeking the writ, was not only obliged, therefore, to show that its right to it was "clear and indisputable", *United States* v. *Duell,* 172 U.S. 576, 582, but that petitioner's action was "arbitrary" and was a "clear error of judgment."[33] This it did not and could not do.

2. In light of the relevant factors of the case, petitioner's judgment was a permissible exercise of his authorized discretion.

The purpose of a bill of particulars "is to furnish to the defendant further information respecting the charge stated in the indictment when necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial", *United States* v. *Glaze,* 313 F.2d 757, 759 (2d Cir. 1963); *United States* v. *Ansani,* 240 F.2d 216, 223 (7th Cir. 1957), cert. den. sub nom. *Milner* v. *United States,* 353 U.S. 936; *Azcona* v. *United States,* 257 F.2d 462, 464 (5th Cir. 1958), and when necessary for those purposes, an accused is entitled "as of right" for the bill to be granted even though it requires "the furnishing of information which in other circumstances would not be required because evidentiary in nature". *United States* v. *United States Gypsum,* 37

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[33] Compare to the showing of prejudice demanded of a defendant seeking reversal on appeal of a conviction predicated upon failure to grant a bill of particulars, *i.e.,* either that the defendant was surprised by evidence he was unprepared to meet, or that he was unable to prepare a proper defense because of the insufficiency of the charge. *United States* v. *White,* 370 F.2d 559, 560 (7th Cir. 1966); *United States* v. *Cohen,* 145 F.2d 82 (2d Cir. 1944), cert. den., 323 U.S. 799; *Medrano* v. *United States,* 285 F.2d 23 (9th Cir. 1960), cert. den. 366 U.S. 968.

F.Supp. 398, 402, (1941), *United States* v. *Smith*, 16 FRD 372, 375 (W.D.Mo., 1954). See also, *Singer* v. *United States*, 58 F.2d 74 (3rd Cir. 1932).

Within these accepted standards of the purpose of the bill of particulars, petitioner contends that his order directing the disclosure in request 25 of relevant information pertaining to oral statements made by the defendant upon which the Government relies, including the names and addresses of persons to whom and in whose presence such statements were made, was not a "'clear error of judgment,'" or "clear abuse of his discretion" warranting the issuance of the extraordinary writ.

The indictments against the defendant below had charged him with making and subscribing false corporate income tax returns, wherein corporate gross sales were understated, in violation of 26 USC. §7206(1), 68A Stat. 852 (R. 13, 14). In his request for bill of particulars he urged that the language of the indictments and the absence therefrom of any details, made them so vague and indefinite "so as to make it impossible for him to plead a conviction or an acquittal thereon in a bar of a second possible prosecution for the same offense, and, further that he will be unable to make adequate preparation of a defense . . ." (R. 21-22).

By some of several requests, the defendant had sought and petitioner had ordered disclosure of the names and addresses of the persons from whom the unreported sales were received, (R. 16); each unreported item of gross sales and the names and addresses of from whom received, if the specific item method of proof was to be used (R. 17); if oral statements of the defendant were to be relied upon, the names and addresses of the persons to whom made and of persons present, date, and place the state-

ments were made and whether the government had memoranda thereof in its possession (R. 20); and, the names and addresses of other persons upon whose oral statements the government did rely (R. 21).

Claiming these four requests constituted a "list of witnesses", respondent refused to comply with the order. (R. 68, *et seq.*). Ultimately, petitioner vacated his order granting the names and addresses of persons other than defendant whose statement would be relied upon (R. 87), and respondent answered two requests. The government claimed in one answer it did not know the names of those from whom unreported gross receipts were received (R. 42) but in the other, furnished the names of 22 customers whose testimony would prove "specific items of sales which are not properly reflected in the records" (R. 46) of the company.

After some concession, the remaining request, which is here in issue, was limited to furnishing the names and addresses of *non-government* persons to whom the defendant made statements material to the proceedings, the date and place made, the names and addresses of others present, and whether a written memorandum or verbatim transcript of the oral statements was made, and if so whether the government had possession of it. Respondent conceded such oral statements to be admissions of the defendant which were to be used at the trial (R. 85).

Respondent's persistent claim before petitioner (R. 68), and in its petition for the writ (R. 5) that a list of witnesses was being ordered furnished which is contrary to 18 USC §3432, 62 Stat. 831, is belied by the obvious fact that a list of witnesses, being an enumeration of *all witnesses* who will testify at the trial, *Bird* v. *United States*, 187 U.S. 118; *Logan* v. *United States*, 144 U.S. 263, would

include the names of persons other than defendant whose oral statements respondent asserts are relied upon to support the charges (R. 28). However, since this request was denied (R. 87), the most that can be urged is that the names of *some* possible witnesses may be disclosed.[34]

After concluding that the proper scope of a bill of particulars is a question left largely to the sound discretion of the trial judge, petitioner analyzed the request. His reasoning is revealing and appropriate to this Court's consideration of whether he "clearly abused" his discretion in granting the request.

> "It is by no means clear that the names thus provided will be a list of witnesses to be called by the prosecution. That some may be called is obvious. However, it is equally obvious that not all must necessarily be called and customarily are not. Also equally obvious is the fact that others besides persons present at such times may be called as witnesses as, for example agents who investigated transactions involving the defendant by interviewing the other parties thereto, accounting witnesses who testify to computations made by them, etc. *The reason for requiring disclosure of their names, however, is not that they will or may be witnesses, but that the defendant requires identification of the times, places and persons present in order to prepare his defense.* Moreover, if the government has any basis for contending that such disclosure will in-

[34] See Brief for the United States In Opposition to the Petition for Certiorari, herein, (pp. 6-10) where no contention was made that a "list of witnesses" was herein involved. Suffice it to say, even if respondent persists in this claim, 18 USC §3432 is no statutory bar to such order, but merely is a legislative pronouncement, that such list *must* be given in a capital case. This court has implied that a district court could, if it wished, in a non-capital case, furnish the matters only required by the statute in a capital case, *United States* v. *Van Dusee*, 140 U.S. 169, 173.

volve physical risk to the individuals or prejudice the government in its ability to produce its evidence, they have not so indicated. Absent such a showing, the defendant is entitled to have the information." (R. 59-60). (Emphasis added)

While the mere fact that the Government may be required to disclose some of its evidence is not, in and of itself, grounds for *denial* of the bill of particulars, *United States* v. *Casserino,* 189 F.Supp. 288 (E.D.N.Y. 1960); *United States* v. *Lipshitz,* 150 F. Supp. 321 (E.D.N.Y. 1957); *United States* v. *Bentvena,* 193 F. Supp. 485 (S.D.N.Y. 1960), cert. den., 375 U.S. 940; *United States* v. *Cimino,* 31 F.R.D. 277 (S.D.N.Y. 1962), cert. den. 375 U.S. 974; *United States* v. *Miller,* 210 F. Supp. 716 (S.D. Tex. 1962); *United States* v. *Smith,* 16 F.R.D. 372 (W.D.Mo. 1954), nevertheless, petitioner's order requires no disclosure of evidence (R. 69), of any legal theories (R. 64), nor even of the substance of the statements made by the defendant (R. 92).

In many cases, the names of actual or potential witnesses have either been disclosed by a bill of particulars, or such disclosure has been discussed with approval. *Kirby* v. *United States,* 174 U.S. 47; *United States* v. *Debrow,* 346 U.S. 374; *United States* v. *White,* 370 F.2d 559 (7th Cir. 1966); *In Re United States,* 348 F.2d 624 (1st Cir. 1965); *United States* v. *Glaze,* 313 F.2d 757 (2d Cir. 1963); *Scott* v. *United States,* 342 F.2d 813 (3rd Cir., 1965); *Ong* v. *United States,* 131 F.2d 175 (4th Cir. 1942); *United States* v. *Lamas,* 337 F.2d 349 (6th Cir. 1964); *Stubbs* v. *United States,* 1 F.2d 837 (9th Cir. 1924); *Patterson* v. *United States,* 344 F.2d 693 (10th Cir. 1965); *United States* v. *Spur Knitting Mills, Inc.,* 187 F. Supp. 653, 654 (S.D.N.Y. 1960); *United States* v. *Miller,* 210 F. Supp. 716 (S.D. Tex. 1962); and see *United States* v. *Bryson,* 16 F.R.D. 431 (N.D. Cal., 1954) cert. den., 355 U.S. 817 noting a

practice in the District of Columbia to furnish defendant with a list of witnesses the government intended to present at the trial in non-capital cases. *United States* v. *Genstil,* 205 F.Supp. 604 (D. Mass., 1962); *United States* v. *Guterma,* 179 F.Supp. 417 (E.D.N.Y. 1959); *United States* v. *McKay,* 45 F.Supp. 1007 (E.D. Mich. 1942); *United States* v. *Cafaro,* 26 F.R.D. 170 (S.D.N.Y. 1960); *United States* v. *Ricciardi,* 40 FRD 133, (S.D.N.Y. 1965), aff'd 357 F.2d 91, cert. den. 384 U.S. 942. Moreover, many courts have commented that the disclosure of the names of witnesses is discretionary,[35] *Barnes* v. *United States,* 347 F.2d 925, 929 (8th Cir., 1965); *United States* v. *Frank,* 23 FRD 145 (D.D.C. 1959); *United States* v. *Solomon,* 26 FRD 397 (S.D. Ill. 1960); c.f. *Downing* v. *United States,* 348 F.2d 594 (5th Cir., 1965) cert. den., 382 U.S. 901.

Since the government was unable to make any showing that any harm or potential harm would befall the persons whose names would be disclosed (R. 59-60, 75, 76) no prejudice exists to the government by such disclosure. C.f. *Gordon* v. *United States,* 344 U.S. 414; *Barnes* v. *United States,* 347 F.2d 925 (8th Cir. 1965). The trial could have proceeded without delay by such disclosure, whereas defendant's surprise occasioned by such withholding could lead to delay during the trial (R. 93).

The Government's approach to the subject order has been "more in the spirit of a ride to hounds than a fair

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[35] Though petitioner has no doubt that disclosure of potential witnesses has occurred in many cases, the *granting* of a bill of particulars is not often reported. This is certainly true as to opinions of the various Circuit Courts of Appeal, for unless a district court is reversed for abusing its discretion in *not* furnishing the bill, an unusual event in light of the broad discretion vested in it, *Wong Tai* v. *United States,* 273 U.S. 77, but see, *Singer* v. *United States,* 58 F.2d 74 (3rd Cir. 1932), the only other possible reported opinion would be by virtue of mandamus. Only one such opinion has been found. *Bondy* v. *United States,* 171 F.2d 642 (2d Cir. 1948).

minded pursuit of the truth'' *United States* v. *Glaze,* 313 F.2d 757, 761 (2d Cir. 1963). It is clear, that petitioner had exercised a broad right of discretion existent in him as a judge of the district court. More particularly, he sought, by his order, to furnish defendant with no more than other courts have from time to time ordered disclosed. There was no abuse of discretion. In any event, under no circumstances could the court below have concluded that his order was the ''clear error of judgment in the conclusion reached upon a weighing of the relevant factors'', *In re Josephson,* 218 F.2d 174, 182 (1st Cir. 1954), which must be found before mandamus could issue to direct the vacation of his order.

It necessarily follows, therefore, that the writ of mandamus was improvidently issued.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, with directions to vacate the order issuing the writ of mandamus against petitioner directing him to vacate his order upon respondent to answer question 25 in defendant's motion for bill of particulars in the case entitled *United States of America* v. *Simmie S. Horwitz,* No. 65 CR 464, pending before petitioner in the United States District Court for the Northern District of Illinois, Eastern Division.

Respectfully submitted,

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